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Supreme Court of the United States

OCTOBER TERM—1959

No. 536

MAX E. GREENBERG,

Petitioner,

against—

AMERICAN SURETY COMPANY OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Max E. Greenberg, respectfully presents his petition for a writ of certiorari to the Supreme Court of the State of New York.

Opinions

The opinion of the Supreme Court of the State of New York held in and for the County of New York is reported in 15 Misc. 2d 422, 181 N. Y. S. 2d 879. A copy thereof is annexed hereto as "Appendix A".

The Appellate Division of the Supreme Court of the State of New York, for the First Judicial Depart-

ment affirmed without opinion on April 14, 1959. Its decision is reported in 8 App. Div. 2d 600, 185 N. Y. S. 2d 221.

The Court of Appeals of the State of New York denied leave to appeal to that court on October 7, 1959, without opinion.

Jurisdiction

The judgment sought to be reviewed is dated April 24, 1959 and was entered in the office of the Clerk of the County of New York on that date. On June 16, 1959, the Appellate Division of the Supreme Court denied leave to appeal to the Court of Appeals. On October 8, 1959, the Court of Appeals denied leave to appeal to that court.

Jurisdiction of this Court is invoked under the Act of Congress of June 25, 1948 C. 646, §1, 62 Stat. 929, U. S. Code 28: 1257, subdivision 3, providing that final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed on certiorari by the Supreme Court where the validity of a statute of the United States is drawn in question or where any title, right, privilege or immunity is specially set up under the Constitution of the United States.

Questions Presented for Review

1. Where legal services are necessarily required in the presentation of a claim to the Treasury Department of the United States for the payment of lost coupons on bonds of the United States and where

Congress enacts a statute permitting the payment of such lost coupons without the production thereof but also provides that no part of the amount appropriated by such statute shall be paid to or received by any attorney on account of services rendered in connection with the claim,

(a) Is such statute unconstitutional as violating the Fifth Amendment of the Federal Constitution providing that no person may be deprived of his property without due process of law?

(b) Is such statute unconstitutional in that it deprives a person who necessarily requires legal services of the inherent right to employ and pay an attorney?

(c) Does such statute bar payment to the attorney for his services either out of funds received by the client upon the payment of the coupons from the previous appropriation for the payment thereof or from the general funds of the client, particularly where the statute does not in fact make any appropriation of funds for the payment of the coupons?

The Act of Congress and Constitutional Provision Involved

The Act of Congress involved was enacted on August 13, 1954 (68 U. S. Stat. at large, Part 2, page A 160: Private Law 656, Chap. 720). It provides as follows:

"AN ACT

For the relief of the American Surety Company of New York and certain other surety companies.

Be it enacted by the Senate and House of Representatives of the United States of America in

Congress assembled, That the Secretary of the Treasury is authorized and directed to make payment, out of the appropriation for the payment of interest on the public debt, to the American Surety Company of New York and other surety companies, severally, as their interests may appear, as assignees of the Chase National Bank of New York, on ten interest coupons in amount of $11,250 each, covering interest due June 15, 1949, on ten $1,000,000 bonds of the June 1, 1945 issue of 2¼ per centum United States Treasury Bonds of 1959-62, Numbered 995E, 996F, 997H, 1001A, 1002B, 1003C, 1004D, 1005E, 1006F and 1027H. Such payment shall be made only upon receipt of satisfactory proof of the ownership and irretrievable loss of such coupons by the Chase National Bank of New York, assignments by the Chase National Bank of all its right, title, and interest in such coupons to the American Surety Company of New York and the other surety companies which reimbursed the Chase National Bank of New York on account of the loss of such coupons, and an agreement to indemnity the United States, executed by the American Surety Company of New York and the other surety companies in such form and amount and as the Secretary of the Treasury may require: *Provided*, That no part of the amount appropriated in this Act shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor

and upon conviction thereof shall be fined in any sum not exceeding $1,000.

Approved August 13, 1954."

The provision of the Constitution of the United States involved is the Fifth Amendment which provides as follows:

"No person . . . shall be deprived of life, liberty or property without due process of law."

The Manner in Which the Federal Question Sought to Be Reviewed Was Raised

The federal question as to the effect of the Act of Congress was raised in the pleadings, motion and briefs in the Supreme Court of the State of New York for the County of New York which was the court of first instance. In the amended complaint (paragraphs 3 and 4) it is alleged that the action involves a controversy as to the rights and legal relations of the parties herein arising out of a contract between the parties and the United States Senate Bill S3062 (the Act here involved) in respect of which a declaratory judgment was sought as to whether such Act prohibits the defendant from making payment out of its general funds for necessary services rendered by petitioner. (Transcript of record, page 9, folio 27).

Upon motion for judgment on the pleadings petitioner in his brief before the Supreme Court specifically raised the question as to his right to payment for services under the Fifth Amendment, said brief stating as follows:

"The Fifth Amendment of the Constitution pro-

vides no person shall be . . . deprived of life, liberty or property without due process of law and that under such constitutional provision, petitioner was entitled to payment for his services and could not be deprived thereof."

In its opinion the Supreme Court stated that the question presented was whether an Act of Congress which states that "no part of the amount appropriated in this act shall be paid to or received by an agent or attorney on account of services rendered in connection with this claim," prohibited petitioner from receiving payment for his legal services out of funds of the defendant other than the proceeds of the claim. (Transcript of record, page 19, folios 55 and 56).

In the Appellate Division of the Supreme Court on appeal from the judgment dismissing the claim petitioner again specifically raised the question as to the constitutionality of the Congressional legislation and argued that the right to employ an attorney and therefore the right to pay an attorney is an inherent constitutional right.

In the Court of Appeals of the State of New York on his motion for leave to appeal petitioner again expressly raised the question as to the effect of the act of Congress and the unconstitutionality thereof as violating the Fifth Amendment of the Constitution of the United States, such questions being presented in the following language in the petitioner's affidavit for leave to appeal:

1. Where legal services are necessarily required and rendered and where as an incident to such services, Congress enacts a statute permitting payment of

lost bond coupons without the production thereof but also provides that no part of the amount appropriated by such Statute shall be paid to or received by any attorney on account of services rendered in connection with the claim and where such act does not in fact make any appropriation of funds for the payment of the coupons, but such appropriation had been made years before the enactment of the Act containing such prohibition,

(a) Does such statute bar payment to the attorney for his services either out of the funds received by the client upon payment of the coupons from the previous appropriation for the payment thereof or from the general funds of the client?

(b) Is such statute unconstitutional as violating the Fifth Amendment in the Federal Constitution and Article 1, Section 6 of the New York State Constitution?

The application of the Act of Congress to petitioner's claim necessarily involved not only the federal question as to the effect thereof upon petitioner's contract of employment and respondent's obligation to make payment to petitioner, but also the question as to whether such Act did not violate the Fifth Amendment in depriving petitioner without due process of law of his right to payment for services necessarily rendered.

In *Bryant* v. *Zimmerman*, 278 U. S. 63, 67, this Court said:

> "No particular form of words or phrases is essential, but only that the claim of invalidity

(of the statute) and the ground therefor be brought to the attention of the State Court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

Statement of the Case

In June 1949 the Chase National Bank lost ten coupons from U. S. Treasury Bonds, 1959-1962 series, each valued as $11,250.00 (28).* Respondent as the controlling co-insurer for the bank made good the loss. Respondent thereupon became subrogated to the right to collect the sum owed by the Government on the coupons. Respondent sought payment from the United States but the Treasury Department refused to pay without production of the coupons (30).

Respondent then retained petitioner to take such action by proceedings in the United States Court of Claims or otherwise as he deemed best to recover the value of the coupons and agreed to pay petitioner 50% of any recovery (29).

Petitioner then rendered the following services:

(a) A number of conferences with representatives of the insurance companies were had at which it was disclosed that the Treasury Department had refused to check to determine whether the coupons had been presented for payment; that the U. S. Treasury Department indicated it would oppose any legislation

* Figures in parentheses refer to folios in transcript of record

granting relief, as it did not desire a precedent to be established relative to payment of lost coupons; that it was of general interest to the sureties to have such precedent established (30).

(b) A complete check of the files of the respondent was made concerning the manner in which the coupons were lost and the circumstances under which they were lost with a view to determining whether there was adequate proof of irretrievable loss (31).

(c) An exhaustive study of the law was made as to the power of the Treasury Department to grant relief. It was ascertained that under 31 U. S. C. 738a, the Treasury Department was authorized to pay a lost interest bearing security upon adequate security; that the Attorney General, on January 29, 1878, had ruled that a detached coupon was not an interest bearing security within the meaning of the Act, but there had been no Court decisions on the question (32).

(d) Further consultations were had as to the steps to be taken toward obtaining relief; advice given as to the possibility and desirability of proceeding in the Court of Claims; the advisability of obtaining an enabling act authorizing the Court to find, on evidence submitted, that the coupons were irretrievably lost and providing for adequate security to the Government as a condition for payment, thus relieving the Treasury Department of the obligation and responsibility for making such findings; preparation of a memorandum as to the relief suggested (33).

(e) Attendance at the Treasury Department and urging the unfairness of its position in refusing to

check if the coupons were presented and offering to pay for the cost of such check and urging the unfairness of its intention to oppose granting any relief. As a result the Treasury Department reversed its position. It checked and ascertained that the coupons had not been presented for payment and it agreed not to oppose legislative relief (33-34).

(f) Petitioner requested a U. S. Senator to submit legislation empowering the Court of Claims to entertain the matter as above suggested, and prepared a form of proposed legislation for submission (34).

The Senate, instead of passing the enabling act requested, passed the Senate Bill S3062, which is the Act of Congress here involved.

It will be noted that though the act provides that "no part of the amount appropriated in this act" might be paid to or received by any attorney, the act itself indicates that, in fact, no monies were appropriated by the act since it directs payment "out of the appropriation for payment of interest on the public debt".

(g) After passage of the Senate Bill, a memorandum to the President of the United States was prepared for the purpose of inducing his approval (36).

(h) Thereafter the Treasury Department was visited and conference had as to the proof required to convince it the coupons were irretrievably lost and as to the documents required by it indemnifying the Government against loss in event of payment (36).

(i) Numerous affidavits in form satisfactory to the Treasury Department were prepared indicating circumstances leading to the conclusion the coupons were irretrievably lost; forms of indemnity agreement were obtained and submitted for signature; affidavit and assignment from the Chase Bank obtained, etc. All steps were taken toward satisfying the Treasury Department that the coupons were irretrievably lost, and the Treasury Department is now ready and desirous of paying the sureties said $112,500, on presentation to it of said affidavits and documents (37).

No further services by petitioner are required in order for the surety companies to obtain payment of $112,500. (38). In order to obtain the said payment, it is only necessary that the respondent and its co-insurers execute the indemnity agreement as prepared (38).

The respondent and its co-insurers are willing to execute and deliver the indemnity agreement and other documents as prepared in order to obtain payment, but do not desire to do so nor to accept payment, unless they may legally pay petitioner for the services rendered by him (39).

The respondent and its co-insurers are ready and willing to make payment to deponent out of their general funds if it is legal for them to do so (42).

It is conceded the services rendered by deponent were necessarily required and were of the fair and reasonable value of $56,250. (39).

It is conceded that the appropriation for the payment of the bond coupons in question was made

years before in the Congressional Act which authorized the issuance of U. S. Treasury Bonds of 1959-1962 (40), that the passage of legislation resulting from the petitioner's services was an incident of the services rendered and not the sole services rendered, and resulted in the establishment of a precedent long desired to be established for the benefit of the surety business (41).

This action was brought for a declaratory judgment declaring that the respondent is not prohibited by the Act of Congress from making payment to petitioner out of its general funds of the sum of $56,250.00 for the legal services rendered by petitioner in accordance with the terms of his contract of employment and for judgment against the respondent for the said sum (42-44).

The respondent in its answer admits all the allegations of the complaint and joined in the application of petitioner for a declaratory judgment as follows:

> "1. For the purpose of this action only, admits all of the allegations in the amended complaint.
>
> 2. Joins in the prayer of the plaintiff that this Court declare, pursuant to Section 473 of the Civil Practice Act of the State of New York, whether or not the defendant is prohibited by the terms of United States Senate Bill S3062, a copy of which is annexed to the amended complaint, from making payment to plaintiff out of its general fund in the sum of $56,250.00 for services as alleged in the amended complaint." (53-54).

Petitioner moved at Special Term of the Supreme Court in the State of New York under Rule 112 of the Rules of Civil Practice of the State of New York for judgment on the pleadings (19-21). Such rule is as follows:

> "Rule 112. Motion for judgment on the pleadings after issue joined.
>
> If either party be entitled to judgment on the pleadings, the court may, on motion, give judgment accordingly, and without regard to which party makes the motion."

Under the provision of the rule that the court may give judgment on the motion without regard to which party makes the motion, the court granted the motion to the extent of awarding judgment on the pleadings to the respondent (13-16) and judgment was entered pursuant thereto dismissing the amended complaint (16-18). A copy of said judgment is annexed hereto as Appendix "B".

Appeal was taken to the Appellate Division of the Supreme Court of the State of New York which affirmed unanimously and without opinion. Copies of the order and judgment of affirmance are annexed hereto as Appendices "C" and "D". Said judgment of affirmance is the judgment sought to be reviewed herein.

Pursuant to Section 589 of the Civil Practice Act of the State of New York appeal to the Court of Appeals of the State of New York from a unanimous affirmance by the Appellate Division lies by permission only. The statute provides for such appeal as follows:

> "By permission of the Appellate Division granted

before application to the Court of Appeals for permission to appeal, and in case of refusal of such permission, by permission of the Court of Appeals."

Application was made to the Appellate Division for such permission to appeal to the Court of Appeals and was denied on June 18, 1959. A copy of the order of the Appellate Division is annexed hereto marked Appendix "E". Application was then made to the Court of Appeals for permission to appeal to that court. Such application was denied by the Court of Appeals on October 7, 1959. A copy of the order of the Court of Appeals denying permission to appeal is annexed hereto marked Appendix "F".

Under the provisions of 28 U. S. Code §1257, subdivision 3, the Court of Appeals of the State of New York is the highest court in that State in which a decision could be had and petitioner was required to exhaust its remedies to review the judgment of the Appellate Division by application to the Court of Appeals for permission to appeal to that court, before petition for certiorari to the Supreme Court could properly be made.

McMaster v. *Gould*, 276 U. S. 284.

REASONS FOR ALLOWANCE OF WRIT

I

The State Court has decided a federal question of substance not heretofore determined by this Court, and which should be determined by this Court, as to whether Congress in the enactment of legislation authorizing payment of a claim may prohibit the payment of any fee to an attorney for necessary services rendered in the preparation and presentation of the claim.

There has been only one prior decision we have been able to find either in State or Federal Courts construing or applying an act of Congress which prohibited the payment of *any fee* whatever to an attorney for the presentation of a claim.

Such decision was in *Davis* v. *Commonwealth*, 164 Mass. 241, 244-45, 41 N. E. 292, 293-94 (1895), where the State of Massachusetts employed plaintiff on a contingency basis to prosecute certain war claims against the United States.

In that case, the services resulted in passage by Congress of an Act authorizing payment to the various states, in trust, for the inhabitants of the state entitled to reimbursement. In Massachusetts, this trust provision had no practical effect, since the State itself was entitled to the money.

The Congressional Act provided "That no part of the money hereby appropriated shall be paid out by

the Governor of any state or territory, or any other person, to any attorney or agent under any contract for services now existing or heretofore made between the representative of any state or territory and an attorney or agent."

Plaintiff sued for his contingent fee of 2%. The Court in allowing the attorney to recover said:

"* * * If the petitioner has performed his contract with Commonwealth, and according to the terms of the contract has become entitled to his compensation, we think it would be no defense for the Commonwealth that it had promised the United States that it would not pay to him his compensation.

* * * *

"It is plain from these allegations that it must be considered that the petitioner assented to the Commonwealth's receiving the money on the terms provided in the statute of the United States of March 2, 1891. The promise implied, on the part of the Commonwealth, if one is to be implied from its acceptance of the money under such a statute, may certainly be regarded as importing at least a moral obligation, which it may be the duty of the Commonwealth to keep. Is it to be inferred that petitioner, in procuring the passage of the statute and in assenting to the Commonwealth's receiving the money under it, intended to waive altogether his claim for compensation? We think not. Congress, in the statute did not undertake to declare void any contracts theretofore made between the representative of any State and an * * * attorney. Congress only provided that the money appropriated

should not be used to pay for the services of any such * * * attorney. If the money was to be held in trust by the State for the persons from whom the tax was collected, this was a necessary provision if these persons were to be paid in full out of it; but if the money was not held in trust by the State, but belonged to the State absolutely, it is largely a matter of form whether the obligations of the State shall be discharged out of the money received from the United States, or out of other funds of the State. We think that due effect can be given to the conduct of the petitioner if we hold that at most it amounted to an assent on his part that he need not be paid out of the money received from the United States, and that the Commonwealth, so far as he is concerned, may keep its promise to the United States.

"But the plaintiff has in substance performed his part of the contract, and the Commonwealth has fully received the benefit contemplated by such performance, and whether the contract was a provident one or not, the Commonwealth ought in substance to perform its part of the contract, and we see no legal difficulty in its doing so. The principal thing promised is a certain amount of compensation, to be determined in a certain manner; and it is a subordinate and separable part of the contract that the compensation shall be paid out of the proceeds, and this last may be waived or modified by the parties without a cancellation or avoidance of the whole contract."

Recovery was allowed out of the general funds of the State.

This Court on two occasions has considered the effect of provisions *limiting* the amount to be paid to an attorney by acts of Congress but this Court has not considered any case where Congress refused to permit *any* payment whatever to the attorney.

In *Capital Trust Co.* v. *Calhoun*, 250 U. S. 208, 213-214 (June 1919) Congress, in passing an Act to pay a claim provided:

> "* * * That no part of the amount of any item appropriated in this bill in excess of twenty per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys on account of services rendered or advances made in connection with said claim. It shall be unlawful for any * * * attorney or attorneys to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim * * *."

The attorney had an agreement for a 50% contingency fee. Plaintiff sued to recover the 30% in excess of the 20% allowed by the statute.

The Court giving effect to the first sentence quoted and not the second, stated at page 216:

> "If the judgment only establishes a claim against the administrator, to be satisfied, not only out of moneys received from the United States, but from other assets of the estate, a situation is presented which, it was said in Nutt v. Knutt, 200 U. S. 12, 21, * * * would not encounter legal objection. In

other words, the limitation in the act appropriating the money to 20 per cent as the amount to be paid to an agent or attorney would have no application or be involved."

Less than one year later in *Calhoun* v. *Massie*, 253 U. S. 170, 175 (1920), the question as to such limitation was raised and this Court, in a five to four decision, did not permit recovery from outside funds, where the statute limited compensation to the attorney to twenty percent "in the aggregate." The Court applying the phrase "in the aggregate" contained in the second sentence of the statute above quoted stated:

> "* * * It is urged that the act here in question should be construed as limiting only the proportion of the specific funds received from the Government which may be applied to payment of attorneys' fees; but the second paragraph of the law leaves no room for construction. It provides that: 'it shall be unlawful for any * * * attorney, * * * to * * * receive any sum which *in the aggregate* exceeds twenty per centum of the claim.'" (Emphasis in original.)

The Court in the *Massie* case further stated (p. 176):

> "In the case at bar there are special reasons why the contract cannot prevail over the statute enacted later."

The distinction between the *Capital* case and the *Massie* case, leading to contrary results, is in the fact, that though the statute in both cases was the same, a

point was presented to the Court in the *Massie* case which had not been argued in the *Capital* case, i. e., that the words in the second paragraph of the statute "in the aggregate" expressly precluded the addition, from outside sources, of funds to be added to those payable from the sums appropriated by the statute.

Inherent in this decision particularly in view of *Capital Trust* v. *Calhoun*, decided so shortly before, is the determination that, except for the indication in the second paragraph of the statute itself that funds from other sources might not be paid as fees, the limitation of payment of fees from the sum appropriated would not prevent payment from other sources.

The court in the *Massie* case does not state that it disagreed with its former decision rendered so shortly before; it did not state it was overruling its previous decision. It simply emphasized the basis of its present decision was that the phrase "in the aggregate" left "no room for construction."

The *Massie* decision was later followed in *Nesbit* v. *Frederick Snare Corporation*, 96 F. 2d 535, 536-537. (D. C. Cir. March 7, 1938), cert. den. 305 U. S. 608 (1938). In this later case although the further limitation "in the aggregate" was not used in the statute, the Court, following the same principle found other words of limitation, i.e. "any sum", prevented payment from outside sources.

The statute there read:

> "* * * That no part of the amount appropriated in this Act in excess of 10 per centum thereof shall be paid * * * to * * * any attorney or attorneys,

on account of services rendered in connection with said claim. It shall be unlawful for any * * * attorney to * * * receive any sum of the amount appropriated in this Act in excess of 10 per centum thereof on account of services rendered in connection with said claim * * *."

The Court of Appeals in disallowing recovery from sources other than the funds appropriated said (p. 538):

"* * * In the present Act the sentence is, 'It shall be unlawful for any attorney to exact, collect, withhold or receive any sum of the amount appropriated in this Act in excess of 10 per centum thereof.' In the Omnibus Act second Calhoun Case) the sentence is, 'It shall be unlawful for any attorney to exact, collect, withhold or receive any sum which in the aggregate exceeds 20 per centum of the amount appropriated in this bill.' This language, Mr. Justice Brandeis in the second Calhoun Case, 253 U. S. 170, 40 S. Ct. 474, 64 L. Ed. 843, said, meant that the attorney should not receive any sum which in the aggregate exceeded 20 per centum of the claim and he italicized the word 'aggregate'; but in the present act the words 'in the aggregate' are absent. * * * Appellants (defendants) insist that any sum means any quantity of money. * * * There are clearly two possible meanings of the sentence, which may best be illustrated by simply transposing the words or phrases. For example, the sentence may be transposed to read 'It shall be unlawful to receive (.) of the amount appropriated (.) any sum in excess of 10 per centum thereof. On the other

hand, the sentence may be transposed to read, 'It shall be unlawful to receive any sum in excess of 10 per centum (thereof) of the amount appropriated.' In the first revised sentence what is unlawful is receiving, from the amount appropriated more than 10 per centum thereof. In the second revised sentence what is unlawful is receiving a fee greater than the stipulated per centum, and in this instance the amount appropriated is not the source of payment but is instead only the basis of computation."

It will be noted that in both the *Massie* and *Nesbit* cases it was not the phrase prohibiting payment "out of the funds appropriated" which the courts held prevented payment from other sources. It was the additional phraseology which prevented such payment. In the *Massie* case it was the phrase "any sum which in the aggregate exceeds twenty per centum" and in the *Nesbit* case it was "any sum of the amount appropriated in this act in excess of 10 per centum." It was the additional words of limitation which prevented payment from outside sources.

In our case, however, there are no additional words of limitation bearing upon the interpretation of the phrase prohibiting payment out of "the amount appropriated in this Act". The interpretation of this phrase alone, therefore, should be similar to that in *Capital Trust* v. *Calhoun*, i.e., the prohibition relates solely to the source of funds and does not prevent payment from other funds.

Sutherland v. *New York and Baltimore Transportation Lines*, 43 F. Supp. 91 (S. D. N. Y. 1941) aff'd

125 F. 2d 551 (2nd Cir.; 1942) also disallowed recovery by an attorney of fees in excess of the percentage allowed in a Congressional Act. The Court, to support its conclusion cited *Nesbit*, stating (p. 95):

> "In Nesbit v. Frederick Snare Corporation, 68 App. D. C. 263, 96 F. 2d 535, the Circuit Court of Appeals for the District of Columbia reviewed the history of analogous Congressional prohibitions that limit the compensation of attorneys who perform services in collecting claims from the Government. Interpreting the intent of the national legislature in passing such limitations, the Circuit Court of Appeals quoted at page 539 of 96 F. 2d, the following language from the opinion of Mr. Justice Brandeis in the case of Calhoun v. Massie, 253 U. S. 170, 173, 174; 40 S. Ct. 474, 64 L. Ed. 843; 'For nearly three-quarters of a century Congress has undertaken to control in some measure the conditions under which claims against the government may be prosecuted. Its purpose has been in part to protect just claimants from extortion or improvident bargains and in part to protect the treasury from frauds and imposition. See United States v. Van Leuven, D. C., 62 F. 52, 56. While recognizing the common need for the services of agents and attorneys in the presentation of such claims and that parties would often be denied the opportunity of securing such services if contingent fees were prohibited, Taylor v. Bemiss, 110 U. S. 42, 45, 3 S. Ct. 441, 28 L. Ed. 64, Congress has manifested its belief that the causes which gave rise to laws against champerty and maintenance are persistent. By the enactment from time to time of laws prohibiting the assign-

ments of claims and placing limitations upon the fees properly chargeable for services Congress has sought both to prevent the stirring up of unjust claims against the government and to reduce the temptation to adopt improper methods of prosecution which contracts for large fees contingent upon success have sometimes been supposed to encourage'."

However, the Congressional Act in *Sutherland* did not contain additional words of limitation which were the basis of construction preventing payment from sources other than the funds appropriated. In *Sutherland* the Act prohibited payment of "part of the amount appropriated in this Act in excess of 10 per centum thereof * * *." We submit *Nesbit* and *Massie* do not sustain the conclusion in *Sutherland* since the reasoning in *Nesbit* and *Massie* expressly indicates it is based upon the further words of limitation in the statutes involved in those cases—words lacking in *Sutherland*. We submit *Sutherland* should be controlled by *Capital* v. *Calhoun* holding that an interpretation of the phrase preventing payment out of "the amount appropriated", by itself, does not prevent payment from outside sources.

II

The right to employ an attorney, and therefore the right to pay him, is an inherent constitutional right.

One has an inherent constitutional right to employ and pay an attorney where he deems it necessary or desirable for the purpose of processing a claim or to ascertain his legal rights; that right is proper in the exercise of one's right to earn a livelihood and to bring his claim to a successful conclusion.

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589 (1897), it is said:

> "The liberty mentioned in that (14th) amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

In prosecuting a claim against the Federal Government for a debt, legal services may be properly employed even though legislation may be required to obtain relief.

In *Gesellschaft Fur Drahtlose Telegraphie M. B. H.* v. *Brown*, 78 F. 2d 410, 414 (D. C. Cir. 1935) cert. denied, 296 U. S. 618 (1935), it is stated:

> "* * * Services rendered for the claimant in petitioning and appearing before the officers of the government or committees of Congress are as professional as appearing in a court of justice. It follows that contracts for contingent compensation for the prosecution of a debt or individual contract claims against the government, even though they may require legislation and appropriation, and the procuring of legislation granting benefits, where no other remedy existed for the enforcement of the claim against the government, have been generally upheld. * * *
>
> [I]n Wright v. Tebbets, 91 U. S. 252, 253, 25 L. Ed. 320, * * * the Court said:
>
> > 'To deprive a claimant of the means of obtaining such professional service would be to deprive him, in many instances, of the means of asserting and enforcing his claim'."

In our case, the government owed interest on bonds. Legislation enabling payment of that debt was necessary because the bond coupons were lost. Respondent needed a lawyer to ascertain its rights, for advice and for seeking a method of relief.

The right to employ an attorney, of practical necessity, must include the right to pay for his services.

This policy is expressed in *Romano* v. *Magiulo, et al.*, 154 Misc. 814, 278 N. Y. S. 985, 990-91 (Mun. Ct., Kings Co. 1935), which involved a claim for fees

in obtaining a Home Owners loan and where the Court refusing to impose a limitation on such fees, said:

> "* * * The freedom of contract is guaranteed by the Fifth Amendment to the Constitution which includes the right to engage in honest and useful work or profession for compensation. * * *
>
> The power of Congress to limit or curtail those rights is confined to cases where a sound public policy requires the protection of certain classes of individuals or the funds appropriated by Congress for their use. This is why limitations on the amount to be charged by attorneys * * * have been sustained. Calhoun v. Massie, 253 U. S. 170, 40 S. Ct. 474, 64 L. Ed. 843.
>
> * * * The loans are not limited to those who are improvident or incapable of properly protecting their own interests. The benefits of this act are open to all those who, because of their financial emergency, are unable to amortize their debt elsewhere. Public policy, therefore, does not require that this class of citizens be protected against extortion or improvident bargains. Indeed, the type of person who owns his own home is usually well able to make contracts and to fully protect his rights. This is not a case, therefore, where Congress may interfere with guarantees under the Fifth Amendment."

The respondent surety company is not ignorant or needy. It is, by the nature of its business, accustomed to employing attorneys. It needs no protection against "extortion or improvident bargains".

It has also been stated that the purpose in limiting compensation to be paid attorneys who obtain moneys

through Act of Congress is to save the government from the importunities of overly zealous attorneys.

> "From the foregoing authorities, it is my thought that the Congress, for the protection of governmental funds, and to save itself from the importunities of overly zealous attorneys, who were themselves to benefit from their successful endeavors, decided upon a rule of public policy that definitely limits the compensation that attorneys for persons having claims against the Government may receive for their services. And, as I think, very wisely, such limitation should apply regardless of the sources from which such compensation may happen to come. In the light of this concept, there is no need to be astute in endeavoring to define and construe words and phrases in such manner as will frustrate what I believe to be the intention and deliberate purpose of Congress."
>
> *Sutherland* v. *New York & Baltimore Transp. Lines*, 43 F. Supp. 94, 95-96 (S. D. N. Y. 1941), aff'd 125 Fed. 2d 551 (2nd Cir. 1942).

We submit there can be nothing overzealous about attempting to collect interest due on the bonded debt of the government.

III

The State Courts have not given any effect to the express provision of the statute prohibiting payment only from the amount appropriated by the Act (55-60) although the Act expressly provides that *no part of the amount appropriated by the Act* should be paid to an attorney. It is conceded by the pleadings that no funds were appropriated by the Act (40) and that the appropriation for the payment of the lost coupons was made years before in the Act authorizing the issuance of the bonds (40).

CONCLUSION

For the reasons above set forth, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

EMANUEL HARRIS,
Counsel for Petitioner,
141 Broadway,
New York 6, N. Y.

MAX E. GREENBERG,
of Counsel.

Certificate of Service

I, EMANUEL HARRIS, counsel for petitioner in the foregoing petition for a writ of certiorari and a member of the bar of the Supreme Court of the United States do hereby certify that on the 17th day of November, 1959 I served three copies of the foregoing petition for writ of certiorari on the American Surety Company of New York, respondent, by causing copies thereof to be served personally on Kissam and Halpin, attorneys for the respondent.

Dated: November 17, 1959.

EMANUEL HARRIS
Counsel for Petitioner

APPENDIX "A".

Opinion of Suprome Court of the State of New York

This motion by plaintiff for judgment on the pleadings presents for determination the question whether an act of Congress which states that "no part of the amount appropriated in this act shall be paid to or received by an agent or attorney on account of services rendered in connection with this claim" prohibits plaintiff from receiving payment for his legal services *out of funds of defendant other than the proceeds of the claim*. Since payment of the claim is dependent upon Congressional action, which cannot be compelled, Congress may impose any limitation it sees fit (Capital Trust Co. v. Calhoun, 250 U. S. 208, 218-219; Calhoun v. Massie, 253 U. S. 170, 176). The limitation is applicable regardless of whether recovery is sought from the proceeds of the claim or from other assets of the claimant (Sutherland, N. Y. & Baltimore Transportation Lines, 43 F. Supp. 94, aff'd on opin. below, 125 F. 2d 551 [C. C. A. 2d 1942]). In the Sutherland case, Judge Knox held that the Congressional limitation "should apply regardless of the sources from which such compensation may happen to come." The Circuit Court of Appeals (Swan, A. Hand and Hand, *JJ.*) affirmed upon the opinion below. This decision of a high federal court relating to the interpretation of a federal act, is entitled to very great weight. The attempt of plaintiff, in the case at bar, to distinguish Calhoun v. Massie, supra, on the ground that the statute there involved contained the words "in the aggregate" must fail, in view of the fact that the brief of the appellant in the Circuit Court of Appeals, in

the Sutherland case, supra, attempted unsuccessfully to make the same distinction.

The fact that the Capital Trust Co. case, the Massie case, and the Sutherland case, supra, all involved a limitation of attorneys' fees to a specified percentage, whereas the statute in the instant case bars any recovery is immaterial as a basis of distinction. If Congress had the right to limit attorneys' fees, it had the right to proscribe any payment whatever.

The contention of plaintiff that a distinction must be drawn between "favor" legislation and "debt" legislation is inapplicable to a case where the legislation, here, bars a recovery for attorneys' services. The distinction has been drawn in cases where the question of the validity of a contingent fee depended on other considerations (Brown v. Gesselschaft, 104 F. 2d 227) and where no such bar as exists here was contained in the statute.

Although the result of denying plaintiff any recovery for his services may seem harsh, it was undeniably within the power of Congress to impose such a condition in enacting a statute which it was not obliged to adopt. The question of whether it intended this result seems to have been settled unfavorably to the plaintiff in the Sutherland case, previously discussed, which this court is constrained to follow.

The motion is granted to the extent of awarding judgment on the pleadings to defendant (see Rules Civ. Prac., Rule 112). Settle order. (Italics in original).

APPENDIX "B"

Judgment of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

(Index No. 2270-1958)

MAX E. GREENBERG,

Plaintiff,

—against—

AMERICAN SURETY COMPANY OF NEW YORK,

Defendant.

A motion having been made by the plaintiff for judgment on the pleadings on the amended complaint and amended answer herein and said motion having duly come on to be heard by this Court on the 17th day of November, 1958 and said motion having been granted to the extent of awarding judgment on the pleadings to defendant, and an order granting such motion to such extent and directing that judgment be entered dismissing the amended complaint herein having been made and entered in the Office of the Clerk of this Court on the 29th day of December, 1958 and the costs of the defendant having been taxed by

the Clerk of this Court in the sum of Twenty-five Dollars ($25.00),

Now, on motion of Kisse[illegible] & Halpin, Esqs., attorneys for the defendant, it is

ADJUDGED that the amended complaint herein be dismissed and it is further

ADJUDGED that the defendant, American Surety Company of New York, 100 Broadway, New York 5, New York, recover of the plaintiff, Max E. Greenberg, 141 Broadway, New York 6, New York, the sum of Twenty-five Dollars ($25.00), its costs of this action as taxed and that the defendant have execution therefor.

Dated: January 2, 1959.

JAMES McGUIRE,
Clerk.

Filed
Jan. 2, 1959
New York Co. Clerk's Office

APPENDIX "C"

Order of Affirmance on Appeal from Judgment and Order

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 14th day of April, 1959

Present—Hon. Benjamin J. Rabin,
Justice Presiding,
" Martin M. Frank,
" Francis L. Valente,
" Harold A. Stevens,
" Francis Bergan,
Justices

1346

Max E. Greenberg,
Plaintiff-Appellant,
vs.
American Surety Company of New York,
Defendant-Respondent.

An appeal having been taken to this Court by the Plaintiff-Appellant from a judgment of the Supreme Court, New York County, entered on the 2nd day of January, 1959, dismissing the amended complaint, and from an order made by said Court entered on the 29th day of December, 1958, granting plaintiff's mo-

tion to the extent of awarding judgment on the pleadings to defendant and directing entry of judgment dismissing the amended complaint, and said appeal having been argued by Mr. Max E. Greenberg, Plaintiff-Appellant *pro se*, and by Mr. James H. Halpin of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered and adjudged that the judgment and order so appealed from be and the same are hereby, in all things, affirmed; and that the respondent recover of the appellant the costs of this appeal.

Enter:

VINCENT A. MASSI /s
Clerk

APPENDIX "D"

Judgment of Affirmance

SUPREME COURT

NEW YORK COUNTY

Index No. 2270/1958

MAX E. GREENBERG,

Plaintiff,

—against—

AMERICAN SURETY COMPANY OF NEW YORK,

Defendant.

The plaintiff above named having appealed to the Appellate Division of the Supreme Court, First Judicial Department from a judgment of the Supreme Court, New York County for the defendant entered on the 2nd day of January, 1959 and from an order made by said Court entered on the 29th day of December, 1958 in the office of the clerk of New York County, and the appeal having been heard at a term of the Appellate Division of the Supreme Court, First Judicial Department in the County of New York, on the 14th day of April, 1959, and an order of said Appellate Division having been made and entered, affirming said judgment and order with costs of said appeal to the respondent, all the justices concurring,

Now, on motion of Kissam & Halpin, attorneys for the defendant-respondent:

It is hereby adjudged that the said judgment be, and the same hereby is affirmed in all things, and that American Surety Company of New York, the defendant-respondent herein, 100 Broadway, New York 5, N. Y., recover of Max E. Greenberg, the plaintiff-appellant herein, 141 Broadway, New York 5, N. Y., the sum of One Hundred Fourteen and 90/100 Dollars ($114.90), costs of said appeal and that it have execution therefor.

Dated: April 24, 1959

JAMES McGUIRRIN
Clerk

Filed
Apr 24 1959
New York
County Clerk's Office

APPENDIX "E"

Order of Appellate Division Denying Leave to Appeal

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 16th day of June, 1959.

Present—Hon. Benjamin J. Rabin,
Justice Presiding.
" Martin M. Frank
" Francis L. Valente
" Harold A. Stevens
" Francis Bergan
Justices

Max E. Greenberg,

Plaintiff-Appellant,

vs.

American Surety Company of New York,

Defendant-Respondent.

The above named plaintiff-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court, entered on April 14, 1959, and from the judgment entered thereon,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of

Max E. Greenberg in support of said motion, and the affidavit of James H. Halpin in opposition thereto, and after hearing Mr. Emanuel Harris for the motion, and Mr. James H. Halpin opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied with $10 costs.

Enter:

VINCENT A. MASSI
Clerk

APPENDIX "F"

Order of Court of Appeals Denying Leave to Appeal

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the eighth day of October A. D. 1959

Present, HON. ALBERT CONWAY,
Chief Judge, presiding.

Mo. No. 394

MAX E. GREENBERG,

Appellant,

vs.

AMERICAN SURETY COMPANY OF NEW YORK,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

A copy

[Seal—State of New York Court of Appeals]

/s/ GEARON KIMBALL
Deputy Clerk